JAN 9 1967
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 952

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

Petitioner

vs.

C. GORDON ANDERSON, TRUSTEE

Respondent

Petition For Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

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Respondent

Petition For Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

The petitioner, the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the captioned case August 12, 1966.

OPINIONS BELOW

The Fifth Circuit opinion below, 364 F2d 936, and its closely related earlier opinion, 334 F2d 118, are printed App. 6a, 3a[1]. Citations of several other Fifth Circuit opinions at earlier stages of the case are collected, App. 6a n.1. Unreported opinions of the District Court in the current case (III 260,387,389) appear at App. 14a-32a.

JURISDICTION

The judgment of the Fifth Circuit is dated and was entered August 12, 1966 (III 563). By order dated November 8, 1966, Mr. Justice Black extended the time for filing a petition for writ of certiorari to January 9, 1967. This Court's jurisdiction is invoked under 28 USC §1254 (1) and 11 USC §47c (Bankruptcy Act, §24c).

QUESTIONS PRESENTED

1. Whether a Chapter X plan of reorganization may be sustained without hearing on substantial issues going to the essential fairness of the plan, where the District Court has denied hearing on the ground that those issues had been foreclosed by an earlier decision of the Court of Appeals, and the Court of Appeals thereafter rules that the issues had not been foreclosed, but leaves untouched the lower court decision.

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[1]Citation conventions: "App.", the appendix to this petition; "III", the record, 5th Cir. #22,652, directly underlying its proceedings on the 1965 plan of reorganization herein involved; "I", the printed record of appeals on a 1959 plan, 5th Cir. #18,475; "II", the record of appeals on a 1962 plan, 5th Cir. #19,996. By stipulation (III 403), I and II were incorporated by reference in III, and have been lodged in this Court under supplemental certificate.

2. Whether a plan of reorganization may be sustained without investigation on-the-record of alleged improper affiliations of the trustee.

3. Whether a plan of reorganization may be sustained where responsible charges of serious fraud against major creditors have been refused on-the-record investigation, and whether compromises of major claims against the debtor and of the debtor's claims, setoffs and counterclaims against these creditors may be compromised without record disclosure of the issues, the facts, the disposition to be made and the reasons for the disposition.

4. Whether a plan of reorganization may be sustained when valuation has been determined on past history alone in explicit rejection of controlling requirements that valuation be based on capitalization of projected earnings, and where proffered evidence of business facts and reorganization facts tending to show the immediately postreorganization earning power of the enterprise has been rejected.

5. Whether stockholders may be entitled to creditor treatment in reorganization where they have bought their stock in a market fraudulently manipulated by the debtor in conspiracy with major creditors, and whether stockholders' claim of creditor treatment may be rejected without hearing on the ground of laches, although the contention was timely known to all parties and was timely acknowledged by the trustee to be valid and meritorious.

In addition, if certiorari is granted, there will be presented for review the following issue decided below

on appeal from a preceding plan — where, however, it was not a final determination but remained ambulatory until embodied in the current plan.

7. Whether a reorganization trustee is prophylactically barred from becoming president of the company.

STATUTES

The principal statutory provisions involved are §§167 and 221 of Chapter X of the Bankruptcy Act (11 USC §§567 and 621), set out at App. 32a - 33a.

STATEMENT OF THE CASE

This is a proceeding under Chapter X of the Bankruptcy Act. The debtor, organized in 1954, was a pioneer in roll-on roll-off ("fishy-back") water transportation; freight is shipped door-to-door overseas in highway trailers carried on trailerships. These trailerships are towed by rented sea-going tugs. Self-propelled vessels, now lost in foreclosures, were planned and instituted.

In less than three years from incorporation of the company until this reorganization proceeding began in 1957, more than 4,000,000 shares of its common stock reached the public at prices of from $1.00 to $4.00 per share, almost half of this through insiders who unloaded at substantial profit to themselves. When the proceeding started there were over 7,000 stockholders. At the time of these sales a speculative market had been created for the stock, in part by a large amount of publicity given to the "fishy-back" method of shipping and to the self-propelled trailership "Carib Queen", an LSD being converted under Mari-

time Administration guarantee. A boiler explosion on the Carib Queen's maiden voyage to France precipitated these proceedings (I 256-286).

The recurrent theme of this reorganization is of its ever bolder domination by those who wrecked the old company, encouraged by the repeated failure of the courts below to stop them. The trustee produced three successive reorganization plans, each opposed by the petitioner Committee and the Securities and Exchange Commission: two since set aside, the third so far sustained. The Committee has contended throughout:

1. that if valued in accordance with controlling decisions of this Court, the estate was solvent;

2. that there has been failure to investigate (under §167) allegations of fraud, conspiracy and other misconduct on the part of two dominant creditors—

   a) the holders of eve-of-bankruptcy mortgages on the operating vessels, who were in fact acting as cover for the old company's financial advisors, Joseph Abrams and Arthur Shaffer, and their affiliates ("Shaffer-Spitzer")[2]

[2]This group referred to herein as "Shaffer-Spitzer" after the names of substitute indenture trustees is also sometimes referred to in the record as the "Caplan" group after the original indenture trustee. The identities of the principals were hidden behind cloaks but were ultimately conceded to be: Abrams, convicted of fraud against the United States and securities frauds; Shaffer; Dr. Robert Erdman, convicted upon plea of guilty to bribing a federal judge in a bankruptcy case; and some lesser lights. Abrams and Shaffer had floated

b) the largest single creditor, the shipyard which converted the company's principal vessel, whose explosion at sea was the immediate cause of the reorganization ("Merrill-Stevens").

The Committee has also contended from the time of the proceedings on the second plan

3. that the stockholders are entitled to creditor treatment by reason of frauds in the flotation of the stock; and

4. that the proceedings were tainted by the trustee's evident lack of independence.

The first Plan: control to Shaffer-Spitzer—The trustee's first (1959) plan of reorganization gave complete control of the debtor to Shaffer-Spitzer. After formulating the plan, the reorganization trustee resigned to become president and a director of the reorganized debtor with stock options (II 525). By a $100,000 under-the-table side-deal, illegal under §221(3) and (4) of the Bankruptcy Act, Shaffer-Spitzer bought the consent of Merrill-Stevens.[3]

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most of the company's stock to the public. Abrams' 1957 conviction for defrauding the United States, I 258, Facts on File 1961-31D2; Abrams' 1962 conviction for bribery in a securities fraud case was reversed on an evidence ruling and presumably will be retried, New York Times Index 1964, p970; Abrams' conviction in an additional securities fraud, ib; related frauds by Abrams are also involved in *Ashbach v. Kirtley*, 289 F2d 159 (CA8, 1961), *Kirtley v. Abrams*, 299 F2d 341 (CA2, 1962). Erdman's testimony as to his bribery, New York Times Index 1962, p510, and his guilty plea and sentencing, ib. 1964, p510.

[3]An interim trustee, on discovery of the deal, petitioned to vacate confirmation, and was supported by the SEC and the Committee. The District Court refused to vacate the plan. An appeal was taken by

The stockholders were excluded from participation by a determination of insolvency reached without any proceedings on the record whatever (I 34). The Committee, with the support of the SEC,[4] appealed (I 206). The trustee moved unsuccessfully to dismiss the appeal as frivolous, and then moved in the District Court for immediate consummation.

At this point the SEC submitted to the District Court sworn evidence that the Shaffer-Spitzer group were not the innocent independent mortgagees that the trustee had insisted on believing them rather than investigate the Committee's charges. The trustee then belatedly investigated that part of the Committee's charges and found that the Shaffer-Spitzer mortgage was a fraudulent transaction by insiders who had wrecked the company and defrauded the public stockholders in violations of the federal securities laws.

Withdrawal of the first Plan — The trustee moved to withdraw his plan as not fair and equitable (I 294), to contest the mortgage claim by setoff and counterclaim and to institute suits against Abrams, Shaffer and Erdman and perhaps others (I 286,291).

The District Court vacated the plan: Shaffer-Spitzer

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the interim trustee but withdrawn. The District Court removed him and reinstated the prior and now still-serving trustee (I 39-40, SEC 194-203).

[4] "We believe that the procedure adopted by the District Court violated basic safeguards provided by Chapter X for the protection of public investors and avoided the careful machinery set up by Congress for the consideration and effectuation of a plan of reorganization" (Response of SEC in Opposition to Trustee's Motion to Dismiss Appeal, Nov. 25, 1959, p3.)

cross-appealed. The Fifth Circuit upheld the District Court's vacation of the plan and held moot the issues raised by the Committee's appeal from confirmation, so that the questions of valuation procedure and absence of §167 investigation were not decided. *TMT v. Anderson*, 292 F2d 455 (1961), pet. by Shaffer-Spitzer for cert.den. 368 US 956.

The stockholders' right to creditor treatment — After his investigation the trustee had proposed, as a result of the Shaffer-Spitzer securities laws violations, to recognize the public stockholders as creditors entitled to participate ahead of the violators (II 1096). The same facts of conspiracy in securities law violations by the company with these insiders grounded the Committee's assertion of a right of defrauded stockholders to participate in the reorganization as creditors. The SEC supported both the principle of the claim and a right to a hearing on the merits (II 1093).

The second plan: control to Merrill-Stevens — The Committee's initial charges against Merrill-Stevens reinforced by the SEC's detailed objections to the claim (I 130; II 1041-2, 1094-5; III 405) produced no investigation. By further documentation before the second plan was promulgated the Committee had shown, in addition to what the SEC had shown, serious contract violations and substantial proof of responsibility for the boiler explosion of the Carib Queen. The Committee also showed reason to investigate Merrill-Stevens' participation with Shaffer-Spitzer and the old management in defrauding the Maritime Administration and rigging the market for the stock being floated by various devices (including the obtaining of a publicized loan guarantee by fraud on the Maritime

Administration (II 1042-1072.4). Although the SEC advised the District Court that these charges required answer and hearing, no hearing was ever had (II 1073).

Notwithstanding the uninvestigated charges of fraud and conspiracy against Merrill-Stevens, the trustee's second (1962) plan gave control of the company principally to Merrill-Stevens (2 places on a board of 7), along with the trustee himself and his general manager (II 297-8) and subsidiarily to a towing company on whom he had bestowed a sweetheart contract for towing (granted above an actual received bid and in the absence of fair opportunity to bid competitively (II 946-954, III 94-6), and to interests affiliated with the trustee's insurance broker (III 353-4), both of whom were heavy buyers of smaller creditors' claims at a large discount (II 261,867,911,938; III 322). The reorganization trustee was again to be president and chairman of the board (II 695,707,987), with a long term contract and formal assurance (or in a later modified version, practical assurance) of substantial stock options (II 274,276-7, 296-9).

Shaffer-Spitzer were not cut out. The "compromise" treatment accorded them is set out below.

The stockholders were again excluded by a determination of insolvency, in proceedings which were conducted in express repudiation of controlling doctrine of this Court as to valuation (infra p 17-18).

The stockholders' claim to creditor treatment was rejected without hearing on the merits (or on the issue of laches later relied on) although the trustee had previously, as recited above, supported the principle of the claim. No

response was ever filed to the Committee's proof of claim; a response filed to the individual stockholder's claim was never noticed for hearing (II 4).

The Committee's appeal from the second plan was supported by the SEC on every major issue. The United States as a creditor appealed because its absolute priority was denied. The Fifth Circuit, sustaining the government, reversed and remanded. *United States v. Anderson*, 334 F2d 311, pet. for cert. (by the trustee) den. 379 US 879. Because a remand was thus necessary, the Fifth Circuit found it unnecessary to decide the issues raised by the stockholders, except that it gave advisory guidance on one point, holding that the trustee was not ipso facto disqualified from the presidency, although he would be if the proponents of the plan assured him of "emoluments and security". *In re TMT Trailer Ferry, Inc.*, 334 F2d 118, 119, 120.

The Committee and the SEC then sought clarification of the Fifth Circuit's remand order, on the ground that there was danger that the trustee and the District Court would misconstrue the Fifth Circuit's failure to deal with the bulk of the Committee's contentions as a rejection of those contentions. The Fifth Circuit declined clarification and trustee and District Court proceeded to make the misconstruction feared. All proceedings on the third plan were conducted on the utterly erroneous view that every contention of the Committee was barred by the law of the case (e.g., III 264,269,388-9,391-3).

As will be seen, the Fifth Circuit, on later appeal, expressly held that its decision had indeed been misconstrued. As will be seen also, the Fifth Circuit nevertheless failed to

remedy the numerous serious errors committed by the District Court in misplaced reliance on the wrong construction it had placed on the Fifth Circuit's decision.

That was the background against which the third plan was formulated and the decision of which we seek review was made.

The third Plan: control again to Merrill-Stevens, without hearing on new challenges — The third (1965) plan recognized the full priority of the government claim, although trustee and District Court had previously asserted that to do so made the plan of reorganization not feasible.[5] In other respects, the plan was substantially the same in form as the second plan.

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To identify separately some of the more remarkable features of this reorganization: —

1. *The refusal to investigate responsible charges of fraud* — On the first appeal, the Fifth Circuit held the issue as to lack of §167 investigation (and other matters) moot because the trustee had pending the appeal investigated and been forced to acknowledge that the charges against one of the creditor groups, Shaffer-Spitzer, had been fully substantiated (supra, p 3).

Lack of investigation and hearing on the Committee's fraud and conspiracy charges against Merrill-Stevens,

[5]A new bank loan to pay off the government, requiring debt service in excess of the trustee's and District Court's projection of earnings, is discussed below in its effect on affiliations under §221(4) and (5).

summarized above, was urged as error on the second appeal. This was one of the contentions that, as stated above, the Fifth Circuit found it unnecessary to decide because of the reversal and remand of the plan for other error.

The Committee (correctly as later held) considered the issue open, and on remand the Committee again pressed these charges in the District Court and attempted to supply even more evidence in support by requesting discovery procedure for documents the trustee had said he could not locate (III 19,85; 16-20). The Committee located these documents in third party (government) hands, and pinpointed them by dates, file number and description of contents (III 310-316).

Consistently applying its erroneous conception of law-of-the-case already noted, the District Court refused the discovery procedures to bring the incriminating documents into the record, on the ground that the issues involved had been conclusively determined against the Committee in the second appeal (III 73,85-6,339-340,346), and discharged the Committee for its recalcitrance in persisting in relitigating the foreclosed issue (III 350-351,368, 388-9). These rulings too the Committee appealed in the third appeal.

Since the Committee's charges of fraud and conspiracy were rejected by the District Court, whose rulings were allowed to stand in the final appeal, it is important to make clear that these were not rash and irresponsible charges: —

—The SEC, charged with statutory responsibility for advising the court in reorganization matters, conducted its own investigations and either expressly concurred in the

Committee's charges and conclusions or expressly advised the District Court that the Committee had made out a prima facie case requiring the adversary parties to go forward with rebuttal and expressly argued the necessity of hearing on the charges. On this major issue, the SEC has supported the Committee in three rounds of appeals.

—The Committee's charges against Shaffer-Spitzer were rejected by the District Court and derided by the trustee as frivolous. Their truth was demonstrated and the trustee was forced to eat crow.

—The Committee's detailed specifications of charges against Merrill-Stevens have never been controverted. The only defense has been the now untenable one that the Committee had no right to litigate this issue.

2. *Refusal to investigate charges of improper affiliations* — As already noted, in three successive plans, the trustee emerged as president and director with a contract and definite or at least practical assurance of stock options.

On the second plan round of appeals, the Fifth Circuit held that the trustee need not as a matter of law be prophylactically barred from presidency of the reorganized company.[6] At the same time, however, the Fifth Circuit

[6]The SEC Advisory Report on the second plan had stated: "The independence and impartiality of the trustee is the very essence of the reorganization process under Chapter X, and must be strictly maintained throughout the proceeding. The prospect of the trustee obtaining a remunerative position with the reorganized company after termination of the trusteeship tends to impair the disinterestedness required of him as trustee. *** The provision in the plan to permit the trustee to serve as president of the reorganized company is clearly improper" (II 743).

held that he would be barred if the proponents of a plan "assured him of emoluments and security rather than merely nominating him for approval by the court and subject to the usual control of the Board of Directors" 334 F2d at 119-120.[7]

Since the Committee believed that just such improper assurances were given and that the trustee had not displayed the required "forbearance of all opportunities to advance self-interest that might bring the disinterestedness of [his] administration into question", ib., the Committee renewed, in proceedings on the third plan, the issue thus expressly held open. The Committee's objections to the plan called upon the District Court to investigate on the record, among other things, promises and payments and affiliations centering around the trustee, because of the relationship of the trustee, on the one hand, to a banking group with the power of life and death over the reorganized company, and, on the other, to the creditors given control notwithstanding uninvestigated charges of fraud and notwithstanding uninvestigated charges of improper patronage (III 244-5). The objection, authorized by the Fifth Circuit decision and by §221(4 and 5) of the Act, was rejected by the District Court without investigation (III 264,269)—another application of the District Court's erroneous conception of "the law of the case".

3. *Improper purported "compromises"* — The Shaffer-Spitzer claim was "compromised" in the first plan by giving them complete control of the enterprise. When inves-

[7]The broader position that the trustee is ipso facto barred will still be open if certiorari is now granted, for the ruling was not final until embodied in the present plan, Stern and Gressman, *Supreme Court Practice* (3d ed. 1962) 18.

tigation was compelled, the trustee withdrew the plan and recommended that the Shaffer-Spitzer claim be "disallowed in toto" or subordinated to claims of general creditors including stockholders who were sold TMT stock in violation of the Securities Acts (II 1096).

Nevertheless, in the second and third plans, the Shaffer-Spitzer claim was purportedly "settled" by allowance as a priority claim in the full amount of the $280,500 cash they had paid for both their egregious mortgage and for 10,000 shares of bonus stock, together with allowance as an unsecured claim of "back interest" from 1958, accruing at $16,000 per year, a unique allowance in this reorganization (I 275,286; II 289,384). Established setoffs and counterclaims (II 1092) were not asserted against them and while one suit was started, others affirmatively recommended by the trustee were not. Three years later (with statutes of limitation running all the while) the trustee for the first time admitted that utter abandonment of these suits had been part of the deals with Shaffer-Spitzer and also Merrill-Stevens (III 192-3): but this off-the-record understanding never appeared on the face of the plan either at that time or in the parallel provision of the third plan.[8]

The Merrill-Stevens claim was "settled" in the second plan by allowance in full amount to the penny, dropping the allegedly secured portion to unsecured status (II 702). But as the SEC pointed out (II 740) the waiver of secured status in this case represents no "compromise";

[8]The SEC's Advisory Report on Plan II observed: "In the light of the trustee's report, the treatment of the Caplan mortgage is not fair or proper. There is nothing in the record to justify the trustee's retreat from this prior position in his report" (II 739).

thereby Merrill-Stevens achieved control. There had been no hearing on the serious and substantial objections, set-offs and counterclaims against Merrill-Stevens (supra); no marshalling; no ruling on the contention made by the government and other creditors that it had no valid maritime lien at all. The basis for this "settlement" was never disclosed on the record. To borrow the SEC's Fifth Circuit brief characterization of this compromise: "wholly unjustified" (Br. in #19,996, p33).[9]

The stockholders appealed, attacking the propriety of the "compromises" made without investigation and without hearing, and were supported in this by the SEC. This was another issue which the Fifth Circuit, in the light of the remand, found it unnecessary to determine.

In the proceedings on the third plan, we accordingly renewed the attack on the Merrill-Stevens "compromise". As already noted, the District Court refused discovery procedures but now held that nothing had "been presented by way of evidence or otherwise to change the opinion of the court expressed in its orders in 1962 overruling those contentions." (III 243,263-4).

4. *Refusal to hear stockholders claim to creditor treatment* — This claim (supra),[10] initially acknowledged by

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[9]"Since the effect of both plans [internal and cash plans] is to exclude the stockholders on an inadequate valuation record, and in the light of the treatment of the Merrill-Stevens claims and the Caplan [Shaffer-Spitzer] mortgage, neither plan is fair and equitable" (SEC Advisory Report. II 741).

[10]The Committee's articulation of the claim took the form of a Statement of Position, served on all parties and presented to the District Court in March 1961, even before the remand on the first plan. In the Statement the Committee, among other things, applied for extension

the trustee, supported in principle by the SEC, was rejected in the second plan without any response to the Committee's proof of claim and repeated earlier assertions of the claim, nor any hearing on a motion to dismiss the individual stockholder's assertion of the claim. On appeal from the second plan, the issue was again one of those never reached in view of the remand for other error.

In proceedings on the third plan, efforts to reassert the claim (III 242-243) were passed over, again on the mistaken ground that the previous rejection without hearing had obtained appellate court approval (III 263-264,269).

5. *Valuation based on explicit repudiation of controlling requirements of this Court* — The Committee objected to the income and expense figures used in the District Court's valuation because they were uncorrected for milking, cost padding and other downward distortions, and because the Committee was not permitted normal examination of these matters. Details are too complex to be set out here, but on the even more fundamental issue of the District Court's insistence on a flat projection of current earnings unadjusted for presently visible

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of time for filing claims. In April 1961 the District Court denied leave to file, without prejudice to the Committee's right "to present its views at the proper time in the course of these proceedings" (II 861, 962, 1037 ff).

Later, in 1962, when the second plan was in the making, the Committee restated this contention in Suggestions for the Formulation of a Plan (II 1083), and at the suggestion of trustee's counsel incorporated it in Proposed Amendments to the Plan (II 1087). The claim was reiterated in Objections to the Proposed Plan (II 1090), and before Plan II was approved the Committee filed formal Proof of Claim (II 358) and the wife of one of Committee counsel, herself a defrauded stockholder, filed an individual Proof of Claim on behalf of herself as well as on behalf of the class (II 368).

trends of the postreorganization future including the trustee's own matured plans, we quote in footnote the SEC's Advisory Report analysis of the records.[11]

6. *The third (present) appeal* — On the appeal from the third plan the Fifth Circuit held that the District Court had been in error. In making the record and confirming the plan in disregard of each of the stockholders' objections described above, the District Court had wrongly foreclosed basic contentions "not in terms discussed and decided" in the earlier appeal, 364 F2d at 939. Neverthe-

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[11] "The approach to valuation by the District Court, as well as by the Trustee, was unduly restrictive. Both used the latest available actual earnings as estimates of future earnings. Indeed, the insolvency order recites that the "only reliable factors are what the Debtor is doing now". As a result, no consideration was given, for example, to future growth of the Debtor's business, the likelihood of which was then clearly indicated. While the District Court said that the effect of increasing the fleet of vessels and truck trailers was "too speculative and uncertain to warrant consideration," the increasing volume of business on hand justified the Trustee's acquisition of additional vessels and vehicles, and, in fact, such additional acquisitions were authorized by the Court before and since the entry of the insolvency order. [*Footnote:* Since the valuation hearings in 1962 the fleet of vessels has increased from three to five and truck trailers from 350 to 670.] Burl E. Thouvenelle, the Trustee's general manager, under whose direction all the Trustee's financial exhibits were prepared, testified that, based on information then available to him, he was able to make a projection of changes in revenues, expenses and profits if additional vessels were acquired, but no such projection was ever made" (III 229-230).

"In view of the inadequacy of the record, there is no reliable basis upon which to resolve the question of valuation. From the viewpoint of the stockholders, the problems of valuation, and the related issue of insolvency; are all the more acute since the plan allows, without any hearings, some $2,000,000 in claims as to which there are substantial disputes. A reduction or disallowance of these claims, in whole or in large part, would by corresponding amounts reduce the valuation required for establishing solvency. There is, accordingly, no adequate support in the record for the exclusion of the stockholders under the plan" (III 235).

less, the plan was allowed to stand and the stockholders were left without remedy. In this, the Fifth Circuit failed to exercise a needed supervision and came into conflict with controlling decisions of this Court and with decisions of the other circuits as we shall show.

REASONS FOR GRANTING THE WRIT

On several issues of importance in the administration of Chapter X, the decision below as we shall briefly show is in conflict with controlling decisions of this Court and with decisions of other Courts of Appeal. But these errors have a relationship more important than the errors themselves.

The crux of this case is conspiracy to defraud. The principals of the conspiracy were major creditors of the debtor and management.

Investigation of the conspiracy was suppressed by a trustee whose personal ambitions were furthered by the suppression.

The suppression of the investigation was countenanced and favored by the District Court.

The Court of Appeals has failed to exercise the supervisory control that it is charged with exercising over the District Court.

The Southern District of Florida has not succeeded in maintaining flawless supervision over the office of reor-

ganization trustee.[12] But the reorganization statute was intended to provide protections that would make it unnecessary for grand juries to determine whether conduct was criminal or merely inept or greedy. This case displays an erosion of those protections to the point where the reorganization scandals of the 1930's have returned in classic form. It exhibits with dramatic fidelity the features reported by the SEC in its fundamental study 30 years ago:

> "The emoluments of control are the stakes of reorganization. Control means profits and protection. He who controls the reorganization controls in large measure the assertion of claims based on fraud or mismanagement which the company or the security holders may have against the management or the bankers. *** He who controls the reorganization controls the dispensation of the vast amount of business patronage present in any reorganization. *** He who controls the reorganization dominates the selection of the new management of the company." SEC, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, Part I, pp4-5 (1937).

The recognition of these and other dangers in reorganization procedures of the 1930's led to fundamental reforms. The first was the requirement of the independent trustee. The second was the requirement of independent trustee investigation. The third was the establishment of

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[12]See the indictment of C. Palmer Parker, reorganization trustee, for arranging sale of a debtor's property to an enterprise in which he had an interest, Miami Herald, September 30, 1966. See also the Fifth Circuit criminal contempt citation of Irwin Ray, reorganization trustee, for commingling funds, docket Number 23891. Cf., Miami Herald, November 6, 1966. Cf. the series of articles ib., November 21-25, 1965, on local bankruptcy matters.

the advisory role of the SEC. Beyond that, the historic requirements of objective valuation by capitalization of businesslike projection of future earnings, of the recognition of the vital role of the independent security holder and the independent security holders' protective committee, and of on-the-table proceedings, rather than under-the-table deals, were all retained.

Each of these protections has been violated in this case, in a manner that sets a pattern easy for others to follow in the future, and that will be followed if this case stands. On the other hand, the case presents for authoritative disposition a paradigm of basic corrections needed to put reorganization back on course.

The violations are not several. They are integrally related to the common fact that the emoluments of control are the stakes of reorganization: for a personally ambitious trustee, for the trustee's patronage beneficiaries, for defrauding creditors who support and are protected by the trustee.

Sed quis custodiet ipsos custodes? Even though the trustee commits no crime, if he is self-serving, and the court who appointed him will not call him to order but good humoredly acknowledges that "he would be perhaps inclined to lean to his employment" (II 331-332), then the appellate courts must, or there is an end to honest reorganization.

I. *The Fifth Circuit's failure to require the District Court to investigate alleged improper affiliations of its trustee defeats the proper administration of Chapter X in a respect so fundamental as to require review under*

Rule 19(b) — The trustee is the "focal point" of a Chapter X reorganization; his functions are "difficult to over-emphasize" (H.Rep.No. 1409, 75 on Cong., 1st Sess. 43.44 (1937). The *independent* trustee "is the key to real reform. In comparison, the other reforms are secondary" (SEC Commissioner Douglas, in hearings before the House Committee on the Judiciary on H.R. 6439, reintroduced with amendments as HR 8046, 75th Cong. 1st Sess. 177 (1937)).

Only through an impartial and independent trustee can the court be in a position to exercise "an informed judgment and to afford a critical scrutiny and supervision of the estate at all times" (H.Rep. No. 1409, supra at 43).

A trustee chooses, and seeing through the trustee's spectacles, the court chooses.

In this case, the trustee chose:

—to urge an "internal plan" that gave him tenure rather than a "cash plan" that would not

—to discourage outside bidders who expressly stated they had not named their top figure for the company, by announcing in advance his preference for the internal plan and by withholding information

—to discourage outside bidders for the towing contract by refusing a copy of the contract they were bidding for and by treating them so repellently that they refused to deal further with him

—to not investigate (until confronted by the SEC with affidavit proof) pointed charges against Shaffer-Spitzer, who had first nominated him to the presidency

—to not investigate at all documented charges against Merrill-Stevens or even look at documents he had never seen which were alleged to establish their guilt

—to "compromise" away major causes of action of the debtor which he himself had established as worth pursuing, at 0 cents on the dollar in off-the-record negotiations

—to refuse to provide for stockholders' claims based on fraud, although he himself had established the basic facts on which they rested and had acknowledged their equity and right to recognition

—to arrange bank loans admittedly crucial to feasibility on terms conditional either on his own retention, or later, on management satisfactory to interests allied with himself, without attempting to get such loans from independent sources.

In addition to such major decisions, there are many more, individually smaller, but in the aggregate making up the tissue of the reorganization—whether to investigate under §203 the acquisition of small creditor's claims by insiders (he chose not to); whether to supply information needed by the Committee and by others (repeatedly he chose not to); whether to acknowledge the existence of his own existing program for improving the operation, or more basically, whether to postpone part of this program deliberately in the hope that it would become effective only after termination of the reorganization (he repeatedly chose not to acknowledge his plans when they existed, and did deliberately postpone them because in his general manager's words, he did not wish to mortgage "the future for the benefit of the past" (III 143,145)).

" . . . the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent", *Woods v. City Bank Co.*, 312 US 262, 268 (1941).

"Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting", *Mosser v. Darrow*, 341 US 267, 271.

" . . . . no matter how impartial and disinterested a trustee may be at the outset, if he hopes for a job in the future for himself, or for his relatives, or friends, he is apt to play 'power politics' and to align himself with the interests which seem most likely to succeed in controlling the debtor after reorganziation or with those who are most willing to make provision for him in the future. If a trustee, with an eye to the future, is to be allowed to sit in the place of a disinterested and impartial judge and reconcile conflicting plans of reorganization between the various classes of security holders, his prescience is apt to concur with his aspirations for the future", Jackson, *The Relationship of the Trustee in Reorganization under The Chandler Act*, Am. Bankr. Rev., p117, De. 1939, quoted from SEC brief in the appeal on Plan II.

That is what happened here.

It does not follow of course, that an independent trustee could not conceivably have reached the same result, although we believe he could not. But enough has been shown to require imperiously, in the interest of the integrity of the reorganization process, that such matters be inquired into and disposed of in an open manner on hearing.

Accordingly, when the Fifth Circuit remanded but expressly held open the question whether there had been assurances of emoluments and security to the trustee which might bring the disinterestedness of his administration into question, we returned to the District Court, and explicitly referring to this branch of the decision (III 245) we sought investigation under §221 (4 and 5) of all promises and payments in connection with the plan and of all affiliations of management, specifying topics to be investigated and grounds for questioning them (III 244-5). This was refused without hearing (III 263-4,266-7,269) basically on the ground that the issue was foreclosed: "The last two decisions of that court [Fifth Circuit] referred to above and decided June 1964 appear to have settled all issues under the present plan of reorganization other than the question of its feasibility ***" (III 269).

The Fifth Circuit on appeal from this ruling acknowledged that the Committee had indeed been right in believing the issue open. Its failure to require record investigation of our charges against this court officer, under these circumstances, was a recusation of its supervisory responsibility.

The Fifth Circuit, has here, in the terms of warrant for

certiorari, Rule 19(b), "so far sanctioned a departure by the lower court *** from the accepted and usual course of judicial proceedings *** as to call for the exercise of this court's power of supervision".

We must however recognize that the Fifth Circuit considered the failure to take charge of this situation was justified on certain grounds. Before proceeding to discuss certain individual matters on which the decision below is in conflict with decisions of this Court and of other circuit courts, it is appropriate that we examine the analysis that led the Fifth Circuit to this result.

The court's analysis was as follows:

Notwithstanding the recognition that the District Court was in error in holding the stockholders foreclosed from raising the points raised here ("I. Prior decision", ~~354~~ 364 F2d at 938), the Fifth Circuit ruled that the stockholders did not have a right to participate in the estate either as creditors or by reason of solvency. It held ("II. Stockholders as creditors", ib. at 939) that the stockholders are not entitled to recognition as creditors because of delay in asserting the claim, and ("III. Solvency or insolvency", ib. at 940) that the stockholders are similarly not entitled to share by reason of an equity in a solvent estate: "The finding of insolvency cannot be held clearly erroneous". Subsidiarily, in reaching this result the Fifth Circuit also sustained the compromises at full value of approximately $2,000,000 of seriously disputed claims out of $5,400,000. The Fifth Circuit said that it was extremely unlikely that disallowance of one or both compromises would have re-

sulted in solvency. The creditors, the Fifth Circuit noted, did not object. Thus, the Fifth Circuit concluded, the stockholders have no further interest and no standing to complain. Finally, the Fifth Circuit declared: "This nine-year-old litigation must at long last be brought to an end".

There is a dangerous circularity in this reasoning: to take just one branch of the argument, we have no standing because the estate is not solvent; therefore we need not be heard on our contention that the valuation proceedings were wholly vitiated by a self-serving trustee's withholding of crucial facts and misrepresentation of others, nor on our contention that crucial evidence was excluded by procedures at odds with controlling law. Since we are not to be heard to raise these questions, the proceedings below cannot be held clearly erroneous, and thus we have no standing.

II. *The decision that lack of standing by the Committee would bar inquiry into fairness of the plan is contrary to Comstock v. Group of Institutional Investors, and other cases* — Assuming arguendo that the Committee has been validly counted out, and that it is significant that the creditors did not speak out, matters to which we will return, nevertheless the issues we have brought forward must be heard even if we needn't be heard.

§206 of the Act, giving stockholders an absolute "right to be heard on all matters" was an intentional broadening of the prior law, 8 SEC, Report, supra, p193 (1940). The decision of the Fifth Circuit, countenancing the silencing of the stockholders because of the District Court holding that they are not to participate, is contrary to that of the Fourth Circuit in *Committee for Holders, etc. v. Kent,* 143

F2d 684 (1944). *Collier on Bankruptcy* §§7.18 and 9.23. Even if stockholders cannot speak for themselves they may speak for public policy and the prevention of fraud.

The reorganization court is required to be—

> "diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it", *Comstock v. Group of Institutional Investors*, 335 US 211, 226-228; dissent in agreement on this point at 235.

Cf. *Young v. Higbee Company*, 324 US 204, 214, where it was held that an equitable defense against a person making a contention on behalf of a class in a reorganization does not preclude relief to the class.

Even if, contrary to our contention, the stockholders' Committee was barred by laches, the issue of the stockholders' right to creditor treatment under the circumstances (initially acknowledged as valid by the trustee, fully supported in principle by the SEC) was one that went to the essential fairness of the plan. It was the District Court's duty to hear it on its merits, laches or no.

Similarly, even if indeed the creditors did not object, the issue of the alleged improper character of major settlements made by the trustee off-the-record went to the essential fairness of the plan. It was the District Court's duty to hear it on its merits on-the-record, solvency or not, and whether other creditors were too cowed to object or no.

Above all, the challenge to the integrity of all of the

trustee's proceedings in the light of his evident personal advantage from each major decision he made (a challenge supported by the SEC) went to the essential fairness of the plan that resulted and to the essential protection of the court's process. It was the District Court's duty to examine on-the-record our specifications of alleged improper affiliations, whether we had standing or no. The Fifth Circuit's failure to hold the District Court to that standard was another recusation of its responsibility of supervision.

III. *The decision that failure of creditors to object bars inquiry into fairness of the plan is contrary to Case v. Los Angeles Lumber Co.* — The Fifth Circuit in rejecting our attacks on the compromises and on the related valuation thought it "significant that not a single creditor has ever complained of either compromise. The only criticism has come from the stockholders' Protective Committee supported by the Commission", 364 F2d, at 941. But even though only a trivial fraction of the creditors objected (R 324,326), this Court has held that overwhelmingly heavy acceptance by creditors will not cure a plan in conflict with the Act's basic requirement of fairness. *Case v. Los Angeles Lumber Co.* 308 US 106.

Indeed this principle was acknowledged at an earlier stage of this very proceeding, *TMT Trailer Ferry, Inc. v. Anderson*, 292 F2d 455 (1961), cert.den. 368 US 956, where the Shaffer-Spitzer plan (eliminating stockholders), was held subject to being set aside and was set aside although all creditors had concurred and only the stockholders' Committee and the SEC objected, as here. The United States as creditor initially also objected, but

withdrew its objection in order to accept a settlement of 30 cents on the dollar (II 563); it has since, by virtue of our sucessful opposition to the plan to which all creditors consented, received one hundred cents on the dollar.

IV. *The failure to require investigation of serious charges of fraud and conspiracy among major creditors and management is in conflict with decisions of the Third, Fourth and Sixth Circuits* — Particularly, because, as shown above (pp. 8-13) creditors under fraud charges wound up in control, the failure of the District Court to order investigation of these charges passes any reasonable boundary of discretion. Investigation under §167, although discretionary in form, is mandatory in fact where there are fraud charges against dominant creditors. 6 *Collier on Bankruptcy* ¶7.18. The decision here conflicts with the views of the Sixth Circuit, *Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F2d 89 (1941); Third Circuit, *Philadelphia & Reading Coal Co.*, 105 F2d 354 (1939); Fourth Circuit, *Committee for Holders, etc. v. Kent*, supra. Cf. Seventh Circuit, In re *South State Street Bldg. Corp.*, 105 F2d 680 (1939).

V. *The failure to require hearing of the stockholders' claim to creditor treatment is in conflict with Czaplicki v. The Hoegh Silvercloud* — The Fifth Circuit sustained on the ground of laches the District Court's refusal to hear the stockholders' claim to creditor treatment. The substantive issue is novel and potentially very important. It may prove to be a valuable adjunct to the armory of enforcement of the securities laws. It does not appear to have arisen before in the context of a reorganization plan, but has substantial precedent in related fields of law. It is fully supported in

principle by the SEC, which also supported the position that the issue was raised in timely fashion.

Very briefly put, the Committee and an individual stockholder on behalf of herself and all similarly situated, assert a conspiracy between the debtor, its financial advisors and their affiliates (Shaffer-Spitzer) and the shipyard (Merrill-Stevens) to float stock (issued in violation of the Securities Act of 1933) in a market fraudulently manipulated in violation of the Securities Exchange Act of 1934.[13] As a result of such manipulation, the defrauded stockholders are entitled, it is argued, to rank in a reorganization as general creditors and in any case ahead of the defrauding creditors. *Oppenheimer v. Harriman Natl. Bk. & Trust Co.*, 301 US 206.

The whole idea of laches is erroneous in fact, for we have already shown that the stockholders raised their creditorship claim early and often (supra, p 16n). The Fifth Circuit's misreading of the record in that respect is of course no ground for certiorari, but it results from a procedural oversight that amounts to a clear denial of fair hearing. The issue of laches, although raised by the trustee in a pleading addressed to the individual claim at the time of the second plan (none was ever addressed to the Committee claim), was never brought on for hearing before the District Court: the District Court decided it against the

[13]The manipulations included such matters as the distribution by the debtor of misleading offering circulars, misleading financial statements overstating assets, lack of disclosure that the certifying accountant was not independent, use for stock publicity purposes of the Carib Queen on a dangerous voyage without exercising care to ascertain seaworthiness, issuance of stock on the basis of a false and fraudulent appraisal publicized by the debtor as a valid and independent one, and many others (II 365-367).

stockholders peremptorily in the order confirming the plan. This was one of that large crowd of District Court errors never ruled on by the Fifth Circuit in the appeal from the second plan, but, as already many times shown above, erroneously deemed by the District Court to be impregnable law of the case at the time of the third plan. By disposing of so important a point of substantive reorganization law as the stockholders' creditorship claim, in an ex parte finding of laches without ascertaining in an orderly way by proof what the facts on laches are, the Fifth Circuit is in conflict with the teaching of *Czaplicki v. The Hoegh Silvercloud*, 351 US 525, 533-534. Cf. also *Baker v. Nason*, 236 F2d 483, 493 (5thCir.1936).

ADDITIONAL REASONS

Space does not permit us to expand on other reasons for granting the writ; but if certiorari is granted we propose to brief also the conflict of the decision below with the law of reorganization compromise and valuation procedure as stated by this Court and other circuits. Other circuits reverse for accepting Chapter X compromises on far more record information than the off-the-record reports (II 25, 283-4) tendered by the trustee here. *Conway v. Silesian etc. Co.*, 186 F2d 201 (2ndCir.1952); *Ashbach v. Kirtley*, 289 F2d 159 (8thCir.1961). Cf. General Order 33, 52(2); *Consolidated Rock Co. v. DuBois*, 312 US 510, 523; *Matter of Natl. Public Service Corp.*, 68 F2d 859 (2ndCir.1933), cert.den. 292 US 1; *Taylor v. Standard Gas etc. Co.*, 307 US 312, 323.

As to valuation, the errors of detail such as cost padding (supra, p 17) would not by themselves merit certiorari review. But the District Court's insistence on making a

purely retrospective valuation[14], approved by the Fifth Circuit on the complacent ground of trial court evaluation of witnesses, ~~254~~ F2d at 940, is not the familiar and authorized weighing of credibility and qualifications but the acceptance of evidence that departs from, and the rejection of evidence that obeys, this Court's command that valuation not so confine itself to the past. *Galveston, H & S.A.R. Co. v. Texas*, 210 US 217, 226; *Institutional Investors v. Chicago, M.St. P. & PR.*, 318 US 523, 540, 542 (1942); *Consolidated Rock Prod. Co. v. DuBois*, supra, p34.

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CONCLUSION

Over and above all of the specific errors are the basic major dangers to which the decision below gives added gravity:—On valuation, as on compromises, as on investigations, as on disposition of claims, it is the trustee who looks and reports and frames the impression of the court. On a record demonstrating that the trustee has interests adverse to the stockholders and favorable to a group of insider creditors, that he withholds valuation facts and distorts others, suppresses investigation, gives away causes of action, makes "compromises" by secret deals, if the District Court that appointed him is not outraged and the courts of review not appalled into corrective action, no

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[14]"Let's value as it now exists [i.e., not when reorganized] to determine what should be done in these proceedings" (II. 170). "All these projections into the future are not going to bother the Court" (II. 192). "Any estimate of future earnings under different circumstances [i.e., use of equipment the trustee in fact planned to buy, etc.] of operation would be speculative and unreliable" (III. 267). "There is no possible future prospects other than what is going on" (III. 55-56). This erroneous approach permeates the entire record.

system of reorganization will achieve fair and equitable solutions.

The trustee is the administrative officer of the bankruptcy court. Both courts below have failed to accept three times tendered opportunity to check his perversion of bankruptcy administration. This, we submit, calls for certiorari review by way of exercise of this Court's power of supervision over the lower courts, under its Rule 19(b).

For the foregoing reasons certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

January 9, 1967

[JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT]

October Term 1965

No. 22,652

D. C. Docket No. 3659-M-EC Bankruptcy

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.
Appellant,

vs.

C. GORDON ANDERSON, TRUSTEE,
Appellee.

Appeals from the United States District Court for the Southern District of Florida

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Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

*Of the Tenth Circuit, sitting by designation.

ordered and adjudged by this Court that the judgments and orders of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 12, 1966

Issued as Mandate: Sep 8, 1966

[OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT]

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Appellant

vs.

C. GORDON ANDERSON, TRUSTEE,

Appellee

June 8, 1964 [334 F2d 118]

Before RIVES, JONES and WISDOM, Circuit Judges.

PER CURIAM: These two appeals are here consolidated. They are taken from the trial court's determination that the bankrupt is insolvent and its later order confirming a plan of reorganization. The appeals were consolidated for argument by order of this Court with Nos. 20400, 20563 and 20659, *United States v. Anderson, Trustee*, decided this day. 334 F. 2d 111. In view of the decision there rendered we remand this proceeding to the district court for a determination of the feasibility of consummating the present plan. If it be found that the present plan is not feasible, after giving to the Government the priority accorded it in the opinion in the companion case of *United States v. Anderson*, then it may be a new plan, based upon an updated determination of insolvency, can be submitted.

In light of the decision to remand this case, it is unnecessary to determine all of the several issues raised

by the appeal. However, one question was submitted by the parties, the answer to which will materially lessen uncertainty in subsequent proceedings. Prior to the approval of the plan presently under discussion contracts of employment between the major creditors and the trustee and two of his subordinates were introduced into the record as part of the plan. They were eventually stricken from the plan, prior to confirmation, and the following provision was the only allusion to the subject:

> "It is necessary that competent management, which might include present management, be employed to operate the reorganized company and that any such management contract is to be approved by the new Board of Directors and the Court."

Briefly stated, it is the contention of the appellant and the Securities and Exchange Commission that the fact that the trustee was to take over the presidency of the reorganized company vitiated the plan. It is contended that the fact that he looked forward to taking up a remunerative position with the company after it got into the hands of its creditors, gave him an interest in conflict with that of the stockholder. This conflict of interest is argued to have been fatal to the plan. We cannot agree. There is nothing presently in the Bankruptcy Law as codified or in the cases thereunder which precludes the employment of the trustee by the reorganized company. Moreover, it is the duty of the proponents of the plan, prior to its confirmation, to disclose "the identity, qualifications and affiliations of the persons who are to be directors or officers. . . ." 11 U.S.C.A. § 621(5).

However, it is our opinion that a trustee would not be

disinterested within the meaning of 11 U.S.C.A. § 558 if the proponents of a plan assured him of emoluments and security rather than merely nominating him for approval by the court and subject to the usual control of the Board of Directors. Equity must exact from its trustees "forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question." *Mosser v. Darrow*, 341 U.S. 267, 271, 71 Sup. Ct. 680, 95 L. Ed. 927.

The plan is not to be rejected merely because Anderson, the trustee, would become president of the reorganized company, but the cause must be remanded for a determination as to the feasibility of the plan in the light of the Government's preferred position as established in the companion case.

REMANDED.

[OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT]

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,
Appellant

vs.

C. GORDON ANDERSON, TRUSTEE,
Appellee

August 12, 1966 [364 F2d 936]

Before PHILLIPS,* RIVES and COLEMAN, Circuit Judges.

RIVES, Circuit Judge: This is a proceeding under Chapter X of the Bankruptcy Act (11 U.S.C. 501, et seq.) for the reorganization of TMT Trailer Ferry, Inc. and certain of its wholly-owned subsidiaries (herein collectively referred to as "the debtor"). This proceeding was initiated upon the filing of an involuntary petition by certain creditors on June 27, 1957, now more than nine years in the past. It has been before this Court on several prior occasions.[1]

The Protective Committee for Independent Stockholders now appeals from an order entered on August 23, 1965,

*Of the Tenth Circuit, sitting by designation.

[1]Caplan v. Anderson, 5 Cir. 1958, 256 F.2d 416; Caplan v. Anderson, 5 Cir. 1958, 259 F.2d 283; TMT Trailer Ferry, Inc. v. Anderson, 5 Cir. 1961, 292 F.2d 455, *cert.den.sub nom*, Shaffer v. Anderson, 1962, 368 U.S. 956; United States v. Anderson, 5 Cir. 1964, 334 F.2d 111, *cert. den.*, 1964, 379 U.S. 879; In re TMT Trailer Ferry, Inc., 1964, 334 F.2d 118.

confirming an amended plan of reorganization of the debtor which excludes stockholders from any participation in the reorganized company and also appeals from five other orders.[2] The Securities and Exchange Commission is a party to the reorganization proceeding pursuant to Section 208 of Chapter X and supports the Protective Committee in certain contentions.

I. Prior Decision.

This is the second time that the Protective Committee with the support of the Commission has sought review by this Court of what is called the Internal Plan of Reorganization of the debtor. Appeals from an order confirming the plan of reorganization taken by both the United States and the Protective Committee were decided in 1964. *United States v. Anderson*, 5 Cir. 1964, 334 F.2d 111, *cert. den.*, 1964, 379 U.S. 879; *In re TMT Trailer Ferry, Inc.*, 1964, 334 F.2d 118. In the appeal by the United States, we held that the nontax claims of the United States exceeding $900,000 were entitled to priority. The record on that appeal showed that the Trustee had stated and the district court had found that the payment of even $635,000, for which the Government at one time had offered to settle, would have rendered the plan unfeasible.

In the appeal by the Protective Committee issues were presented *inter alia* as to whether those to whom stock of

[2]The other appeals are from orders entered: (1) January 18, 1965, approving the renewal of a towing contract; (2) January 21, 1965, denying the Committee's motion for production of documents; (3) May 14, 1965, sustaining objections to the Committee's request for admissions; (4) May 21, 1965, discharging the Committee as representative of stockholders as a class; (5) May 25, 1965, authorizing consummation of the amended plan.

the debtor had been sold in violation of the federal securities laws were entitled to participate as creditors, and whether the plan should be rejected because the Trustee would become President of the reorganized company. The issue last stated was decided on that appeal in accordance with the decision of the district court. The cause was remanded for a determination as to the feasibility of the plan in the light of the Government's preferred position as established in the companion case. The Court stated that, "In the light of the decision to remand this case, it is unnecessary to determine all of the several issues raised by the appeal." On remand the district court took the position that "the decisions of the appellate court sent the plan of reorganization back only for determining the feasibility of the plan in light of the preferred position of the government's nontax claims, and that by refusing to reverse this court's rulings on the issues referred to, the appellate court has in effect affirmed this court's decisions on those issues."

We do not agree, but hold that this Court's reversal of the order of confirmation left open those issues not in terms discussed and decided. *See Mutual Life Ins. Co. v. Hill*, 1904, 193 U.S. 551, 553-54; *Wolff Packing Co. v. Industrial Court*, 1925, 267 U.S. 552, 562; *Seagraves v. Wallace*, 5 Cir. 1934, 69 F.2d 163, 164.

II. Stockholders as Creditors.

In the interest of clarity, we consider first the failure of the district court to hold hearings on the claims of the Protective Committee and of Irma S. Mason, one of the stockholders, asserting a claimed right of rescission of purchasers of stock based on violations of the federal se-

curities laws and claiming that they and other stockholders holding such claims should rank as creditors in any plan of reorganization. The district court held these claims to be without merit on their face, stating its reasons as follows:

> "The Stockholders' Committee also filed a PROOF OF CLAIM FOR RESCISSION on behalf of unnamed stockholders who purchased stock of the debtor on the open market. The facts stated in this document are insufficient to show that any stockholders as a class or individually have valid claims against the debtor. Furthermore, the claim is filed too late and is vague and indefinite as to whom the claimants are and the extent and amount of their claims. It is too nebulous to delay reorganization at this stage.
>
> "Likewise, the claim filed by Irma S. Mason, wife of a member of the Stockholders' Committee, seeking to rescind her purchases of TMT stock on the open market is without merit for the same reasons. It shows that her damages, if any, are recoverable against others than the debtor."

The district court had, by an order entered February 4, 1958, fixed April 4, 1958 as the last day for the filing of proofs of claim. True, it had excepted "proofs of claims of creditors and/or interest of stockholders * * * founded upon securities." Other parts of the district court's order had pretty clearly indicated that the exception as to proofs of claim founded upon securities contemplated a contract claim rather than a tort claim or right of rescission. We think the district court properly construed its order so as

to require the filing of claims of the nature of those filed by the Protective Committee and Irma S. Mason seeking rescission to be made on or before April 4, 1958.

It is argued, however, that the bar date should not apply because many of the details which provide the bases for these claims were unknown until the report of the Trustees' investigation filed July 1, 1960. However, these claims were not filed until June 1962, almost two years after the filing of that report. No valid reason or excuse is given for the delay from July 1960 until June 1962. To allow the filing of additional claims of an unknown number of stockholders, which by their nature might have required years to liquidate and which might have delayed indefinitely the formulation of any plan of reorganization, would have been extremely prejudicial to the creditors. Under all of the circumstances, we cannot say that the district judge abused his discretion in refusing to extend the time for the filing of claims and in declining to consider these claims on their merits.

III. Solvency or Insolvency.

Much weight must be given to the long familiarity of the able and experienced district judge with the debtor and his evaluation of the witnesses who testified in his presence. *See Mayer v. Dolan*, 2 Cir. 1944, 145 F.2d 880, 881-82. The district judge thought it too uncertain and speculative for him to consider estimates of earnings "based on hypothetical circumstances at variance with the facts of past experience," and in so ruling he did not abuse his discretion.

In July 1962, the district court, after extensive hearings

and full discussion, determined the debtor's going concern value to be $2,780,000. Comparing that value with the creditor's claims which had been allowed in the total amount of about $5,400,000, the district court found the debtor to be insolvent. After this Court's last remand, the district court required further evidence as to solvency *vel non* limited to happenings subsequent to the 1962 valuation hearings. Upon that evidence, the Court commented:

> "The court required, by order entered January 5, 1965, further evidence on this subject limited to happenings subsequent to the 1962, valuation hearings. The court had found the debtor insolvent at that time, and it appears from subsequent events that the debtor is more insolvent now than it was in 1962 when earnings had reached a peak. As predicted by the trustee, the level of earnings reached that year of $524,000 did not last. They dropped to $403,000 in 1963 and to $200,000 in 1964. This was caused by several unfavorable factors the principal of which was increased competition from large steamship lines serving Puerto Rico. It appears from the evidence that these competitors in the latter part of 1962 began rate-cutting practices deliberately designed to take business from TMT. They have been successful to an extent requiring TMT to reduce its rates on automobiles and other heavy volume traffic, thus materially reducing its margin of profit on each trip. This smaller margin of profit has caused a decline in net earnings in spite of a greater volume of traffic obtained by the increase of the trailer ship fleet from three to five vessels since 1962. Increases in costs of operation have also contributed to the decline in earnings.

"The SEC and the Stockholders Committee insist, as they did during the valuation hearings in 1962, that the court should have required evidence of future earnings, subsequent to reorganization, based upon estimates of revenues and expenses after substantial changes in operations and acquisition and substitution of new type vessels and other equipment, and based upon expanded operations expected to take place under private management. However, neither the trustee or the court can anticipate what the reorganized company will do, and any estimates of future earnings under different circumstances of operation would be speculative and unreliable. The trustee has operated the business successfully for more than seven years and the past earnings recorded under the trusteeship furnish the most reliable basis upon which to measure future earnings for going concern value purposes in this proceeding.

"The court in 1962 found the going concern value to be $2,780,000 based upon retention of the high level of earnings during the first half of that year. It is apparent now that this value was too high and would be much lower based on any average of the earnings recorded under the trusteeship.

"Another factor which depresses the value of the debtor is the requirement that the government non-tax claims must be paid in full in cash. This will reduce the equity of the new owners of the debtor by approximately $500,000.

"It is therefore the opinion of the court that the debtor remains insolvent, and the court reaffirms its former finding of insolvency and its decision that

under the strict priority rule stockholders have no equity in the reorganized company and are entitled to no further participation in these proceedings."

Included in the approximately $5,400,000 of claims allowed against the debtor were compromises of approximately $2,000,000 in two seriously disputed claims. The persons most directly affected by those compromises were other creditors, and it is significant that not a single creditor has ever complained of either compromise. The only criticism has come from the stockholders' Protective Committee supported by the Commission. It is extremely unlikely that even a disallowance of one or both compromises would result in solvency of the debtor and thus allow the stockholders to participate in a plan of reorganization. It is, of course, conceded that compromises are "a normal part of the process of reorganization." *Case v. Los Angeles Lumber Products Co.*, 1939, 308 U.S. 106, 130; 6A Collier on Bankruptcy, 14th ed., ¶8.07, pp. 28-32.

We are not called on to decide whether the district court has accurately computed the going concern value of the debtor and the amount of the creditors' claims, but only whether its decision that the debtor is insolvent is clearly erroneous. *See Meyer v. Dolan, supra; Trinity Building Corporation Preferred Stockholders v. O'Connell*, 2 Cir. 1946, 155 F.2d 327, 329. The finding of insolvency cannot be held clearly erroneous.

It follows that the stockholders represented by the Protective Committee have no further interest in the plan of reorganization and no standing to complain. This nine-year-old litigation must at long last be brought to an end. The judgments and orders appealed from are

AFFIRMED.

[OPINIONS OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA]

OPINION AND ORDER APPROVING AMENDED PLAN OF REORGANIZATION

March 19, 1965 [II 260]

Status of the Proceedings

This court on February 14, 1963, entered an order confirming the Internal Plan of Reorganization. Appeals were taken by the United States of America and by a Stockholders Committee. The appeal by the government resulted in a reversal of that portion of the plan and the orders approving and confirming it which provided that the government's non-tax claims were not entitled to priority. *United States of America v. Anderson.* (5th C.C.A. 1964) 334 Fed. 2d 111. The other appeal, decided at the same time, resulted in a remand of the cause "for a determination as to the position as established in the companion case." In re *TMT Trailer Ferry, Inc.* 334 Fed. 2d 118.

Thereafter, proceedings were held before this court to consider amendments to the plan made necessary by the appellate court decision in the government appeal, to consider the feasibility of the plan when so amended, and to determine whether events subsequent to the last valuation hearings held in 1962 would have any bearing on the finding made by the court in July, 1962, that the debtor was insolvent and therefore the stockholders of the debtor corporation are not entitled to participation in the reorganized company.

The Amendments to the Plan

The trustee recommended that the material provisions of the Internal Plan of Reorganization be retained and that it be amended to meet the requirements of the appellate court decisions and to include certain other minor clarifying provisions. These proposed amendments were considered at a hearing held on January 18, 1965, after notice to parties in interest, and were given tentative approval by the court in an order entered January 21, 1965. The principal amendment provided for the payment in full in cash upon consummation of the non-tax claims of the United States, the fact amount of which is approximately $904,000. The court found this to be a material change adversely affecting the interests of creditors inasmuch as the value of these claims under the plan as originally confirmed was approximately $340,000.

The only other material change was one authorizing the reorganized company to borrow upon substantial consummation of the plan up to $1,250,000 from conventional sources at current interest rates, payable over a period of years at no more than $25,000 per month plus interest, in order to meet the cash requirements of consummating the plan including payment of all the government claims in full.

The plan as amended was forwarded to the Securities and Exchange Commission for examination and report and the Commission filed its report on March 9, 1965. It was also forwarded to the Secretary of the Treasury as required by law and to all creditors and stockholders together with a Notice of Hearing to be held on March 15, 1965, for consideration of the approval of the plan as amended.

No further amendments to the plan were suggested before or at this hearing except those of the SEC that the corporate charter be amended to provide for cumulative voting by stockholders for directors of the reorganized company and to provide for preemptive rights for stockholders in the issuance and sale of any additional capital stock by the company. While there may be merit to these suggestions, they do not appear to be material to the fairness or equitableness of the plan. They were not included in the original plan which was accepted by vote of more than the required two-thirds of the creditors, and no creditor has suggested that he desires such provisions for his benefit.

It is the purpose of the court to limit material amendments to the plan to those required by the decisions of the appellate court, and in the absence of compelling reasons for the suggested further changes, the court will not require the charter to be amended in these particulars but will leave the consideration of any such amendments to future determination by the new owners of the reorganized company.*

The only objections filed to the approval of the plan were those of the Securities and Exchange Commission and of the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. The main points in these objections were that the plan improperly excluded stockholders from participation because of alleged lack of adequate evidence as to valuation, that stockholders in the 1962 proceedings had been improperly precluded from an op-

*Reference to the Delaware law and decisions which govern the corporate debtor indicate that the charter changes which the SEC suggest are a matter of choice by the corporate owners.

portunity to present claims based on alleged fraud and conspiracy in the issuance of stock by the debtor, and that the compromises in the plan of the Merrill-Stevens and Caplan Mortgage claims had been improperly approved by the court. Nothing however, has been presented by way of evidence or otherwise to change the opinions of the court expressed in its orders in 1962 overruling these contentions. Furthermore, it is the opinion of the court that the decisions of the appellate court sent the plan of reorganization back only for determining the feasibility of the plan in light of the preferred position of the government's non-tax claims, and that by refusing to reverse this court's rulings on the issues referred to, the appellate court has in effect affirmed this court's decisions on those issues.

The court has considered other objections raised by the Stockholders Committee and finds them to be without merit. Among these is the suggestion that investigation should be made of the creditors Florida Towing Company and George H. Salley, and of their relationships with the debtor, the trustee and other creditors. The court has been fully informed from time to time of the affiliations of these creditors and finds nothing improper in them. In fact there has never been any attempt to show that these creditors have transgressed any law or duty which affects this reorganization in any way.

Furthermore, objections of this kind come too late and the court has previously approved the participation of these creditors in the affairs of the debtor which the plan was originally approved and confirmed.

The court therefore overrules all objections of the SEC and the stockholders committee with respect to the fair-

ness and equitableness of the amended plan and the affiliations of those who may be entitled to participate in the reorganized company.

The Feasibility of the Amended Plan

The only question involved here is whether the debtor will be able upon consummation of the plan to pay the government non-tax claims in full and meet the other cash requirements involved. The record shows that with payment in full of the non-tax claims a total of approximately $1,502,000 will be required for those claims which must be paid in cash.* The trustee presented evidence showing the ability of the debtor upon reorganization under the plan to borrow as much as $1,250,000 from a commercial bank on conventional terms, as heretofore outlined. This amount, together with approximately $350,000 in cash on hand would be more than sufficient to meet all cash requirements of consummation. Evidence presented shows that the assets of the debtor and its proved earning ability will secure a loan of $1,250,000 that can be paid off within a few years without impairing its working capital. The reorganized company would have no other debt.

The SEC in its report has found that the plan is feasible and the court agrees. The Stockholders Committee has questioned the feasibility, based upon a statement in an order of the court dated September 28, 1962, that the debtor did not have sufficient cash to pay the government non-tax claims in full. That statement was made, how-

*Claims total about $5,400,000. The remainder, about $3,900,000 are to be satisfied by the issuance to such claimants, pro rata, of 1,300,000 shares of the authorized common stock of the reorganized debtor.

ever, in the absence of evidence at the time of the ability of the debtor upon reorganization to borrow sufficient money to pay such claims in full. It is readily apparent that at this time the debtor can finance the cash requirements of consummation.

The stockholders committee also urges that the bank loan commitment which the trustee presented in order to prove the debtor's ability to borrow $1,250,000 is conditioned upon management satisfactory to the bank, that this is objectionable because the trustee is a director of another affiliated bank, and that it would give the lending bank and the trustee indirectly some measure of improper control over the reorganized company. This contention is without merit because it is not improper for the trustee to seek a commitment from a bank with whom he has some connection, and the court in accordance with the provisions of the plan will see that the initial management of the reorganized company is responsible and acceptable in commercial circles. Furthermore the reorganized debtor will not be bound to borrow from the bank that made the commitment, The Florida National Bank of Jacksonville, Florida. It is the opinion of the court that when the time comes the reorganized debtor will have no trouble making such a loan from any commercial bank with resources sufficient for a loan of that size.

The Solvency of the Debtor

The court required, by order entered January 5, 1965, further evidence on this subject limited to happenings subsequent to the 1962 valuation hearings. The court had found the debtor insolvent at that time, and it appears from subsequent events that the debtor is more insolvent

now than it was in 1962 when earnings had reached a peak. As predicted by the trustee, the level of earnings reached that year of $524,000 did not last. They dropped to $403,000 in 1963 and to $200,000 in 1964. This was caused by several unfavorable factors the principal of which was increased competition from large steamship lines serving Puerto Rico. It appears from the evidence that these competitors in the latter part of 1962 began rate-cutting practices deliberately designed to take business from TMT. They have been successful to an extent requiring TMT to reduce its rates on automobiles and other heavy volume traffic, thus materially reducing its margin of profit on each trip. This smaller margin of profit has caused a decline in net earnings in spite of a greater volume of traffic obtained by the increase of the trailership fleet from three to five vessels since 1962. Increases in costs of operation have also contributed to the decline in earnings.

The SEC and the Stockholders Committee insist, as they did during the valuation hearings in 1962, that the court should have required evidence of future earnings, subsequent to reorganization, based upon estimates of revenues and expenses after substantial changes in operations and acquisition and substitution of new type vessels and other equipment, and based upon expanded operations expected to take place under private management. However, neither the trustee or the court can anticipate what the reorganized company will do, and any estimates of future earnings under different circumstances of operation would be speculative and unreliable. The trustee has operated the business successfully for more than seven years and the past earnings recorded under the trusteeship furnish the most reliable basis upon which to measure

future earnings for going concern value purposes in this proceeding.

The court in 1962 found the going concern value to be $2,780,000 based upon retention of the high level of earnings during the first half of that year. It is apparent now that this value was too high and would be much lower based on an yaverage of the earnings recorded under the trusteeship.

Another factor which depresses the value of the debtor is the requirement that the government non-tax claims must be paid in full in cash. This will reduce the equity of the new owners of the debtor by approximately $500,000.

It is therefore the opinion of the court that the debtor remains insolvent, and the court reaffirms its former finding of insolvency and its decision that under the strict priority rule stockholders have no equity in the reorganized company and are entitled to no further participation in these proceedings.

Necessity for Terminating These Proceedings

It will be soon eight years since these reorganization proceedings began in June 1957. The unpaid claims of more than five million dollars include trade creditors of more than four million in addition to governmental claims of nearly one million two hundred thousand. The Internal Plan of Reorganization as Amended is the product of several years of effort by the court, the Trustee and representatives of creditors to produce a fair and equitable plan that will give the unsecured creditors an opportunity to realize eventually a portion of their claims.

These proceedings have been the subject of five recorded decisions by the United States Court of Appeals for the Fifth Circuit. The last two decisions of that court, referred to above and decided in June 1964, appear to have settled all issues under the present plan of reorganization other than the question of its feasibility which this court now, with the concurrence of the Securities and Exchange Commission, has determined in favor of the plan as amended. No creditor has voiced any objection to the amended plan and it is the hope of the court that it will be accepted by them in the vote that will be taken so that TMT can be returned to private control in the near future and the long trusteeship terminated.

Objections to the plan come only from a Stockholders Committee which has never represented, by its own admission, more than a minute fraction of approximately seven thousand stockholders. The SEC has supported this committee with great zeal in an effort to obtain some equity for the stockholders, but the SEC appears to have overlooked the superior rights of creditors holding more than $5,000,000 in claims to whom they also have a duty. See *Securities and Exchange Commission v. American Trailer Rentals. Co.*, ___ U.S. ___ October Term, 1964, decided January 18, 1955. The court has given thorough consideration throughout these proceedings to the alleged equities of the stockholders, but is required on the record before it to conclude that there is no merit to the contentions made in behalf of the stockholders. Their rights in TMT must give way to the superior rights of the creditors when the debtor is clearly insolvent.

Wherefore, it is ORDERED, ADJUDGED and DECREED that:

1. The Internal Plan of Reorganization as Amended is fair and equitable and feasible, and is hereby APPROVED by the court.

2. The Summary of the Internal Plan of Reorganization as amended, attached hereto as Exhibit A, is hereby approved.

3. The Trustee shall transmit by mail to each creditor of the debtor, including debenture bond holders, and to the Securities and Exchange Commission and to the Secretary of the Treasury of the United States, a copy of each of the following:

a. This order with Exhibit A hereto.

b. The Internal Plan of Reorganization as Amended.

c. The Report and Recommendations of the Securities and Exchange Commission on the Amended Plan.

d. A form for acceptance or rejection of the Amended Plan, as approved by the Court.

4. April 7, 1965, is fixed as the day and the time within which creditors of the debtor, including debenture bond holders, may accept or reject the Amended Plan by executing and delivering to the Trustee by mail or otherwise the form provided therefor, on or before said date.

5. The Trustee shall file with the court no later than April 13, 1965, his report of acceptances and re-

jections of the Amended Plan, and shall mail a copy thereof to those parties entitled to notices of proceedings herein.

6. A hearing will be held before the court in the Post Office Building, Miami, Florida, on Monday, April 19, 1965, at 3:00 o'clock P.M. for the following purposes:

a. To consider the Trustee's Report of Acceptances and Rejections of the Amended Plan, and any objections thereto.

b. To consider the confirmation of the Amended Plan if the same is accepted by the required number of creditors, and such objections as may be made thereto.

c. To consider appropriate action under Section 236 of the Bankruptcy Act if the Amended Plan is not accepted by the required number of creditors or if confirmation thereof is refused.

d. To adjourn said hearing from time to time without further notice if the court determines that such action is desirable.

7. The court retains jurisdiction of this cause for further proceedings herein.

DONE and ORDERED at Miami, Dade County, Florida, this 18th day of March 1965.

s/ Emett C. Choate
United States District Judge

ORDER DISCHARGING STOCKHOLDERS COMMITTEE

March 19, 1965 [II 387]

The Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc., was authorized by order of this court to represent the interests of stockholders of the debtor by order dated September 16, 1957. This committee is composed of Raymond M. Dukaty, Nathan D. Lobell and Irwin S. Mason.

It has subsequently been determined in proceedings held from time to time that the debtor is insolvent. Findings of insolvency have been entered by this court in orders dated February 24, 1959 and July 9, 1962, and March 18, 1965. An appeal by the Stockholders' Committee from the insolvency order of July 9, 1962, resulted in a decision by the appellate court that it was unnecessary to determine the issues raised in behalf of stockholders, and thus the insolvency order was allowed to stand with all rights of stockholders eliminated from further consideration. See *The Protective Committee, etc. v. Anderson*, 334 F.2d 118 (5th CCA-1964).

It is apparent that no further services are required of the Stockholders' Committee since the court has approved and confirmed the Internal Plan of Reorganization as Amended, which like its predecessors eliminates all equity of stockholders.

Recent efforts of the Stockholders' Committee to litigate

issues which have been determined by this court adversely to the Committee's contentions have been stopped by orders of this court. ORDER DENYING MOTION FOR PRODUCTION OF DOCUMENTS, dated January 21, 1965, and ORDER SUSTAINING OBJECTIONS TO REQUEST FOR ADMISSIONS, dated May 14, 1965, were entered as a result of the Committee seeking information from the United States government pertaining to certain claims that have been allowed and liquidated in the plan of reorganization. These efforts of the Committee to litigate matters which are not in issue before the court are not in the best interests of the debtor.

No useful purpose to either the stockholders or the debtor will be served by continuing to recognize the Committee as a party to these proceedings.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that Raymond M. Dukaty, Nathan D. Lobell and Irwin S. Mason as PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY INC. be and they are hereby discharged as representatives of stockholders as a class in these proceedings; provided however that said committee may prosecute such appeals as they have heretofore taken and are pending from the recent orders of this court.

DONE and ORDERED at Miami, Dade County, Florida, this 18th day of May, 1965.

s/ Emett C. Choate
United States District Judge

ORDER IN AID OF CONSUMMATING PLAN OF REORGANIZATION

May 25, 1965 [II 389]

This cause was heard after due notice to parties in interest on the Trustee's PETITION FOR CONSUMMATION OF PLAN OF REORGANIZATION. The only objections to consummating the Plan are those of the Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc., and of the Securities and Exchange Commission, the Stockholders' Committee having filed Notice of Appeal from the order entered herein dated April 22, 1965 confirming the Plan of Reorganization.

The SEC has filed a motion for an order staying the Trustee and the reorganized company from issuing any stock incident to consummation of the reorganization plan pending ultimate determination of all issues in the appeals arising out of this proceeding, on the ground that consummation of the Plan may cause irreparable harm to the debtor and the investing public in the event of reversal of the Order of Confirmation. It is asserted by the SEC that the appeals referred to, all taken by the Stockholders' Committee, will raise certain issues with respect to the Plan of Reorganization that were considered by the appellate court in the former appeal by the Committee which was decided by the Fifth Circuit on June 8, 1964. See *Protective Committee etc. v. Anderson*, 334 F.2d 118.

The main issues which the Stockholders' Committee and the SEC continue to raise concern the solvency of the Debtor and the possible fraud claims by stockholders. The record shows that evidence has been presented on the

solvency at numerous times during these proceedings and this Court has made findings of insolvency in orders dated February 24, 1959, and July 9, 1962, and March 18, 1965.

It is also asserted by these parties that the plan of reorganization should make provision for encouraging stockholders to file claims based upon alleged fraud in the issuance by the debtor of its common stock. The Court has always been available to adjudicate any valid claims of fraud by stockholders, but none were filed except those filed by the Stockholders' Committee purporting to act on behalf of defrauded stockholders generally. The contentions of the Stockholders' Committee and of the SEC with respect to the existence of such claims were disposed of in this Court's OPINION AND ORDER APPROVING PLANS OF REORGANIZATION dated July 9, 1962, and again in the OPINION AND ORDER APPROVING AMENDED PLAN OF REORGANIZATION of March 18, 1965.

Other issues sought to be re-litigated at this late date in these proceedings concern the propriety of provisions in the plan of reorganization for settlement of the Caplan preferred ship mortgage claim and of the maritime lien claims of Merrill-Stevens. These settlements were approved by the Court in the July 9, 1962, order approving the plans of reorganization, and the settlements as well as other elements of the present plan have been accepted twice by vote of the creditors, first in 1962 and recently in 1965. The creditors are the only ones concerned in these settlements because, as this Court has previously found, if these two claims were disallowed in toto, the debtor would still be insolvent.

What is most significant with respect to the raising of these issues again, nearly three years after this Court had first disposed of them, is that they were taken to the Fifth Circuit Court of Appeals in the case cited and that court refused to disturb the decisions of this Court. The appellate court said it was unnecessary to determine those issues and sent the proceeding back to this Court solely for a determination as to the feasibility of the plan in view of the decision rendered at the same time holding that the non tax claims of the United States government must be afforded priority.* This Court has found the plan feasible after its amendment to provide for the payment in full of all government claims, and the Securities and Exchange Commission has likewise found the amended plan feasible in the report thereon that it has filed. It is therefore the opinion of the Court that there will be no merit whatever to appeals taken which raise only issues that the appellate court has had before it and found unnecessary to determine. Under these circumstances there should be no further delay in consummating the Plan of Reorganization and the motion of the SEC for a stay will be denied.

The objections of the Stockholders' Committee to the consummation of the plan are the same as those previously asserted and overruled with respect to the approval and confirmation of the plan. They are substantially the same as those of the SEC; that is, their objections to the plan are the same as those made to the original Internal Plan of Reorganization and outlined above, and which were the subject of the former appeal. They are therefore without merit.

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*See *United States* v. *Anderson* 334 F.2d 111

The Trustee has requested authority to proceed with certain essential actions to be taken in consummating the plan. The certificate of incorporation of the debtor should be amended as proposed by the Trustee in order to comply with the requirements of the plan. No objections have been made to the taking of that action. It has been recommended that the Court reapprove the persons to be the directors of the reorganized company. The following have been heretofore approved as directors by order entered herein dated May 16, 1963: —

C. Gordon Anderson of Miami, Florida
B. E. Thouvenelle of Miami, Florida
Gardner T. Gillette of Jacksonville, Florida
James C. Merrill, Jr. of Jacksonville, Florida
W. T. Coppedge, Jr. of Jacksonville, Florida
Shelby P. Langston of Miami, Florida
Rafael Martinez-Alvarez of San Juan, Puerto Rico

The identity, qualifications and affiliations of the above named persons have been fully disclosed; no objections have been voiced to their appointment; their appointment as initial directors of the reorganized company is equitable, compatible with the interests of the creditors and all other parties concerned and is consistent with public policy.

No objection has been expressed to the approval of the reorganized company borrowing up to $1,250,000 under the provisions of the plan to raise the necessary cash required to consummate the plan and the Trustee has presented evidence showing that such a loan is available from the Florida National Bank and Trust Company of Jacksonville, Florida.

The Court finds that the best interests of the debtor require the prompt consummation of the Plan of Reorganization and termination of these proceedings which are in their eighth year.

The SEC has announced an intention to seek a stay order in the appellate court if this court denies the SEC motion for a stay; therefore this order will not become effective for *15* days in order to give parties an opportunity to perfect any emergency appellate action desired.

WHEREFORE it is ORDERED, ADJUDGED and DECREED as follows:

1. The objections of the Stockholders' Committee to the consummation of the plan are OVERRULED.

2. The petition of the Securities and Exchange Commission for a stay of the issuance of any new common stock is hereby DENIED.

3. The Trustee is authorized and directed to proceed with the consummation of the plan in the particulars set forth in his Petition.

4. The seven persons named above in this order are hereby approved as the initial Board of Directors of the reorganized debtor and they are authorized and directed to meet for the purpose of organizing and taking such actions as are required to consummate the plan.

5. This order shall become effective *15* days from the date hereof.

6. The Court retains jurisdiction for the purpose of supervising the consummation of the Plan of Reorganization and carrying on the trusteeship for the purposes stated in the Plan.

DONE AND ORDERED at Miami, Dade County, Florida, this 24th day of May, 1965.

s/ Emett C. Choate
Senior United States District Judge

BANKRUPTCY ACT PROVISIONS INVOLVED

Sec. 167. The trustee upon his appointment and qualification —

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named.

Sec. 221. The judge shall confirm a plan if satisfied that —

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been jully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.